

**Testimony of Montana Association of Realtors® (MAR)  
House Natural Resources Committee  
61<sup>st</sup> Session of the Montana Legislature  
February 2, 2009  
OPPONENT OF House Bill No. 275**

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A STATEMENT OF PURPOSE AND FINDINGS FOR A DECLARATION OF EMERGENCY STREAMFLOW; CLASSIFYING AN EMERGENCY STREAMFLOW AS AN EMERGENCY APPROPRIATION ENFORCEABLE BY THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION; AMENDING SECTION 85-2-113, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Dear Chairman Milburn and members of the Committee:

For the record, my name is Abigail St. Lawrence, and I represent the Montana Association of Realtors® ("MAR"). MAR represents over 4,600 real estate brokers, property managers, salespersons, and affiliates throughout Montana and is the business advocate for Montana real estate professionals, representing practitioners active in all phases of real estate brokerage, management, development, and appraisal. MAR opposes House Bill ("HB") 275 because it flies in the face the prior appropriation system, is unnecessary and contrary to existing statute allowing for maintenance of instream flow within the bounds of the prior appropriation system, and would constitute an uncompensated taking of valid existing property rights.

First and foremost, MAR opposes HB 275 because it is directly contrary to one of the most fundamental principles of water rights in Montana—first in time, first in right or the prior appropriation system. HB 275 would grant a "super priority" to water deemed necessary for emergency streamflow, regardless of any other priorities on the source. The prior appropriation system demonstrates its value precisely when water availability is an issue. In the height of summer when streamflow is typically at its lowest point and demand, particularly for irrigation water, is generally at its peak, the prior appropriation system works to administer the amount of water available, with the newest users being cut back first. The value of a water right is quite often not in how much water the right is for, but in how old the water right is and, therefore, how much "wet" water can actually be delivered each year pursuant to the water right. HB 275 would decimate the entire system of prior appropriation that all water users depend on being enforced by granting the state an overarching right to shut off appropriations when streamflow reaches the arbitrary point of 25 percent of average annual flow.

HB 275 is also unnecessary, given that several existing provisions in Montana law already provide for maintenance of streamflows within the operation of the prior appropriation system. Mont. Code Ann. § 85-2-316 allows the state or any political subdivision or agency thereof or the U.S. or any agency thereof to apply for and, subject to specified statutory criteria, receive a reservation of waters for a number of purposes, including minimum flows. "A state water reservation issued under this section [Mont. Code Ann. § 85-2-316] has a priority of appropriation dating from the filing of a correct and complete application with the department." Mont. Code Ann. §85-2-316(7).

Second, any water right holder can apply for and receive, subject again to specified statutory criteria, authorization to change all or a portion of an existing water right to maintain or enhance instream flow to benefit fisheries. *See*, Mont. Code Ann. § 85-2-408. Any such authorization is valid for up to 10 years (*see*, Mont. Code Ann. § 85-2-407(2)), with an extension of up to an additional 10 years. *See*, Mont. Code Ann. § 85-2-407(3). This particular provision has been utilized successfully by groups such as the Montana Water Trust to lease existing water rights to enhance streamflow. Additionally, irrigators who change from flood to sprinkler irrigation have been able to use Mont. Code Ann. § 85-2-408, in conjunction with Mont. Code Ann. § 85-2-419, to change to instream flow that amount of water that is no longer required to be diverted due to the change in irrigation methods.

Third, Mont. Code Ann. § 85-2-436 specifically authorized the Montana Department of Fish, Wildlife and Parks to change a water right that it either owns in fee simple or has leased to instream flow "to protect, maintain, or enhance streamflows to benefit the fishery resource." Mont. Code Ann. § 85-2-436(1). Again, any such change is subject to the criteria applicable to any change in an appropriation right set forth in Mont. Code Ann. § 85-2-402, as well as other specified criteria. And, most important for consideration of HB 275, Mont. Code Ann. § 85-2-436 also operates within the confines of the prior appropriation system. In short, the Montana Water Use Act already has no less than three options for maintenance of instream flow, all within the bounds of the prior appropriation system.

Finally, MAR urges this committee to carefully consider the fiscal note that accompanies HB 275. In particular, MAR directs attention to what is **not** included in the fiscal note. "The fiscal note **does not** include the costs of compensating water users who may have a valid property right on water that is diverted for emergency stream flow for fisheries; such cost reimbursement could be substantial." (emphasis added) The description of fiscal impact set forth in the fiscal note is an understatement of the compensation costs associated with HB 275. A water right is a recognized property interest in Montana, separate and apart from the land to which it is appurtenant. *See*, Harrer v. N Pac. Ry. Co. (1966), 147 Mont. 130, 133, 410 P.2d 713, 715. As a property interests, it is protected from taking or damage for public use without just compensation pursuant to Article II, Section 29 of the Montana Constitution. Shutting off a water right during low flow for an alleged public purpose as would be authorized under HB 275 would no doubt give rise to countless claims for takings compensation. Consequently, the actual cost of HB 275 could easily get very high very quickly, particularly if some of those water rights shut off include irrigation rights that are necessary for a viable crop. The bottom line is that HB 275 would authorize taking of private property without compensation, giving rise to lawsuits against the state for damages. Both the mere cost of litigation and the final rewards for compensation could very easily and dramatically escalate the fiscal impact of HB 275.

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HB 275 is a radical departure from the prior appropriation system that is a bedrock principle of Montana water law, is unnecessary given the existing statutory provisions to allow for water rights for instream flow within the operation of the prior appropriation system, and constitutes an uncompensated taking of private property. For all these reasons, please recommend a "do not pass" on House Bill No. 275. Thank you, and I will be available for any questions.